Supreme Court, U.S.
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NO.

In The Supreme Court of the United States

RICKEY MEDLOCK,

Petitioner,

v.

DONALD RUMSFELD, SECRETARY OF DEFENSE, NIMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Rickey Medlock's petition involves several federal questions of national importance.

1) Does a Government Agency Violate Title VII by Adopting a "Pay Band" Promotion Policy that has a disparate impact upon African-Americans, without a non-discriminatory business justification?

2) Is nepotism actionable under Title VII, when it has a disparate impact on African-Americans, does *Medlock* overrule *Thomas v. Washington County School Board*, 915 F2d 922, 924 (4th Cir. 1990)?

3) Does either Title VII or the Rehabilitation Act of 1973, as amended by the Americans with Disabilities Act of 1990, protect an employee from a retaliatory performance appraisal for asserting his/her rights under Title VII?

4) May Defendants be granted summary judgment employment discrimination cases based upon Defendant's own conclusory affidavits, prepared by its attorneys, where no discovery has been permitted and Defendant has not even answered the Complaint?

5) Are civil rights plaintiffs entitled to a lesser right to discovery than are parties to all other civil litigation?

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PETITION FOR WRIT OF CERTIORIARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Rickey Medlock, Petitioner, respectfully petitions this Honorable Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

Decisions of the Fourth Circuit, adopting the District Court Opinions

The February 11, 2004 *per curiam* Order of the United States Court of Appeals for the Fourth Circuit, *Medlock v. Rumsfeld*, 86 Fed. Appx. 665, 2004 U.S. App. LEXIS 2252 (4th Cir. 2004) is reproduced at A-3. The February 27, 2004 Order of the Court of Appeals for the Fourth Circuit denying Petitioner's timely request for a rehearing *en banc*, or in the alternative, rehearing, is included at A-5.

Opinions of the District Court

1. December 31, 2002 Order

On December 31, 2002, the District Court, *via* Judge Deborah Chasanow, denied the Defendant's *Motion to Dismiss*, upholding the sufficiency of the Complaint but granted the Defendant's *Motion for Summary Judgment*. (A-6)

2. April 4, 2003 Order

On January 15, 2003, Medlock filed a *Motion for Reconsideration of the Court's December 31, 2002 Order*. Medlock included in the *Motion for Reconsideration*, a Rule 56(f) affidavit from his counsel, to comply with the letter, as well as the spirit of Rule 56(f). Judge Chasanow refused to consider the Rule 56(f) affidavit supplied and reaffirmed her December 31, 2002 decision. (A-25)

JURISDICTION

This Court should grant Medlock's petition for *certiorari*:

1) pursuant to Supreme Court Rule 10(c), because the Fourth Circuit has decided an important federal question that conflicts with decisions of this Court setting forth the standard for granting summary judgment, including *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986);

2) pursuant to Supreme Court Rule 10(a), because the Fourth Circuit has decided important federal questions that conflict with decisions of other circuits, with respect to: a) liability under Title VII of the Civil

Rights Act of 1964 for nepotism, where it results in a disparate impact against African-Americans, in employment decisions; b) the application of Rule 56(f) to deprive a plaintiff of discovery in employment discrimination cases; and c) granting summary judgment in intentional discrimination cases without discovery or other opportunity to cross-examine witnesses and assess credibility.

3) pursuant to Supreme Court Rule 10(a), because the Fourth Circuit's decision has sanctioned such a departure from the accepted and usual course of judicial proceedings, by a lower court, as to call for an exercise of this Court's supervisory power.

RELEVANT STATUTES AND REGULATIONS

See A-1.

STATEMENT OF THE CASE

Facts Giving Rise to Medlock's Causes of Action

On April 2, 2002, Petitioner Rickey Medlock filed an action in the United States District Court for the District of Maryland, pursuant to Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973, as amended by the Americans with Disabilities Act of 1991, alleging employment discrimination on the basis of race, sex, disability and retaliation.

Appellant Rickey Medlock is an African-American male with a disability, chronic facial pain disorder. Medlock has a college degree, with a B.S. in Sociology and sixteen years of administrative experience. Six of those years included military managerial administrative experience, including both national and international

operations. Plaintiff began with NIMA on January 23, 1997.

On March 29, 1999, Medlock accepted a position as a Human Resources career intern, advertised as a "GS" "career ladder" position, as opposed to the WORKFORCE 21 positions being "phased in" at the Defendant Agency. Agency documentation indicated that Medlock was accepting a position in which he could be non-competitively promoted, a career ladder employee. Medlock accepted the offer based on the express representation in the job announcement that he would be mentored, trained and given opportunities for promotion, based on his work performance, skills and abilities.

Medlock received performance pay, a monetary award, for his work performance, based on his performance evaluation of September, 1999. Medlock received a Special Act Award, an additional monetary award, in July of 2000. Medlock has received high praise as an outstanding employee who goes the extra mile."

When Medlock applied for the career ladder promotion for which his internship was to prepare him, he was forced to compete with other persons, in unrelated job categories, for unrelated promotions, under the new WORKFORCE 21 system. Under the WORKFORCE 21 promotion system, all twenty (20) persons eligible for a promotion to the next level, or "pay band," from various categories and job descriptions, competed with each other for only four promotions.

The four selectees for promotions consisted solely of all four of the White female co-workers (and reportedly, friends) of Judy Schiebel, the Chair of the promotion panel. Ms. Scheibel and all of the selectees worked together in the same NIMA office in St. Louis. The selection rate for White females was 80%; the selection

rate for African-Americans was 0%, although 50% of the applicants were African-American. The selection rate for males was 0%; Plaintiff was the only male candidate. Human Resources support personnel were predominantly female.

Medlock alleged discrimination on the basis of race, sex, disability and retaliation in the promotion decision, both on theories of disparate treatment and disparate impact. The disparate treatment claim was based on the subjective decision of a panel, which included his then supervisor, Bobby Webster, a White male, who had targeted Medlock for adverse treatment when he became Medlock's supervisor..

Medlock claimed disparate impact discrimination in three respects: 1) the competitive promotion system of WORKFORCE 21 had a disparate impact on African-Americans, as the Agency's own head publicly stated and the Agency's own studies concluded before it was abolished; 2) Schiebel practiced nepotism, favoring promotion candidates from her own staff in St. Louis; and 3) nepotism in the administration of WORKFORCE 21 competitive promotion system, with White supervisors helping White applicants through the process.

On November of 2001, in "The Edge," NIMA's monthly internal newsletter, General Clapper again addressed problems with WORKFORCE 21 and the pay band system General Clapper specifically stated that:

> blacks are clearly the most disadvantaged (in terms of promotions, rotational assignments and percentages of SESes, for example) of any grouping in NIMA...

NIMA's own *Affirmative Employment Program for Minorities and Women, Annual Accomplishments Report*

for Fiscal Year 2001, page 6-7, specifically reported the results of its own study of the adverse impact of WORKFORCE 21 on African American employees. The Report concluded that the promotion process utilized under WORKFORCE 21 had an adverse impact on African-Americans. The Agency specifically recommended that the WORKFORCE 21 process be changed to include: "Established Improvement Process teams, Established Standardized Promotion Methodology, Revised Supervisory Input Form and Instituted mandatory training for all promotion panel members."

After Medlock filed his internal September 2000 discrimination claim, his performance evaluation dropped from 460, out of 500, which is in the range identified as "excellent," to 280, in the range for a mere "successful" rating. Medlock's performance evaluation was reduced dramatically, in 2001, to 280 – an overall rating of "successful." This rating was only five points above "marginal" (200-275). If Medlock had scored five points less, he would have been placed on a "PIP," Performance Improvement Plan, and been in danger of dismissal.

Decision of the Fourth Circuit

Medlock asked the Court of Appeals for the Fourth Circuit to reverse the District Court's grant of summary judgment to the Agency so that his case could be heard on the merits. On February 11, 2004, this Court issued a *per curiam* decision, adopting the decision of the district judge by reference, without discussion; consequently, the trial court opinions are the only opinions in this case.

Opinions of the Trial Court, Adopted by the Fourth Circuit

On April 2, 2002, Appellant Rickey Medlock filed suit in the United States District Court for the District of

Maryland, pursuant to Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973, as amended by the Americans with Disabilities Act of 1991, alleging employment discrimination on the basis of race, sex, disability and retaliation.

The Defendant never answered the *Complaint*, but instead, filed a *Motion to Dismiss, or in the Alternative, for Summary Judgment*. Absolutely no discovery has ever taken place in this case. Medlock argued, in his *Opposition*, that summary judgment was inappropriate without discovery. Medlock specified the need for depositions, document production and Answers to Interrogatories, and an Answer to the Complaint. Judge Chasanow denied the *Motion to Dismiss*; yet proceeded to grant summary judgment to the Agency, absent any opportunity for discovery or even an Answer to the Complaint.

REASONS FOR GRANTING THE *WRIT*

I. QUESTION #1: Does a Government Agency Violate Title VII by Adopting a "Pay Band" Promotion Policy that has a Disparate Impact Upon African-Americans, without a Non-Discriminatory Business Justification?

Medlock claimed disparate impact discrimination in three respects: 1) the competitive promotion system of WORKFORCE 21 had a disparate impact on African-Americans, as the Agency's own studies concluded before it was abolished; 2) Judy Schiebel, the Chair of the promotion panel, practiced nepotism, favoring promotion candidates from her own staff in St. Louis, which consisted entirely of the four White females promoted by the panel; and 3) nepotism in the administration of WORKFORCE 21 competitive promotion system resulted in White supervisors helping their friends, who were

disproportionately White, through the competitive promotion process, while African-Americans were disproportionately left without such assistance and were disadvantaged in the promotion process.

The WORKFORCE 21 promotion policy had an adverse impact on African-Americans, constituting a *prima facie* case of discrimination under the disparate impact theory. *Wards Cove v. Atonio*, 490 U.S. 642 (1989); *Griggs v. Duke Power*, 401 U.S. 424 (1971). NIMA's own 2001 investigation and Report revealed that WORKFORCE 21 had an adverse impact on African-Americans, as was publicly stated by NIMA's General Clapper. Medlock has, therefore, established a prima facie case of disparate impact, as alleged in his complaint, through the implementation of WORKFORCE 21.

Pursuant to this Court's rulings in *Atonio* and *Griggs*, the burden should have shifted to the Defendant to prove a legitimate, business justification for the discriminatory policy and, if produced, permit Medlock to demonstrate that a less discriminatory policy would serve the same purpose. Judge Chasanow never proceeded to these stages, but simply refused to accept Medlock's alleged disparate impact claims as they were written; instead, she reframed them as disparate treatment claims, and dismissed them. The Agency never moved to dismiss Medlock's disparate impact claims, or for summary judgment on these claims; consequently, these claims should have survived the Agency's motion; yet, Judge Chasanow, *sua sponte*, granted summary judgment to the Agency on all of Medlock's claims.

Judge Chasanow did not address Medlock's disparate impact claims under the disparate impact case law cited by Medlock. Judge Chasanow only mentioned one of Medlock's disparate impact claims, in footnote 6,

on pages 16-17 (A-18), and mischaracterized it as a disparate treatment claim. Medlock specifically brought this omission to the trial court's attention in his *Motion for Reconsideration*. Judge Chasanow's April 4, 2003 *Memorandum Opinion* purported to address Medlock's disparate impact claims, but, in fact, again mischaracterized them as disparate treatment claims and never discussed the controlling Fourth Circuit case, *Thomas v. Washington County School Board*, 915 F.2d 922 at 924, or any other case law examining disparate impact analysis. (A-32-34)

II. QUESTION # 2: Is nepotism actionable under Title VII, when it has a disparate impact on African-Americans, or does *Medlock* overrule *Thomas v. Washington County School Board*, 915 F.2d 922 (4th Cir. 1990)?

The Fourth Circuit established, thirteen years ago, that nepotism, although not a violation of Title VII *per se*, violates Title VII when its practice has a disparate impact on the basis of race. *Thomas v. Washington County School Board*, 915 F.2d at 924 (4th Cir. 1990). Medlock alleged that Chair of the promotions panel, Judy Scheibel, favored her friends and associates from St. Louis, all White females, and that this was a substantial factor in the result that only these four White females were promoted to the competitive promotions for which *Medlock* applied.

The Fourth Circuit had cited *Thomas*, with approval, as recently as 1998, *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742 (4th Cir. 1998) (assessing methods of fashioning class relief where hiring practices had a disparate impact on minorities). See *also Gilliam v. Lee County School Board*, 2002 U.S. Dist. LEXIS 24858 at * 13, fn. 6 (W.D. Va. 2002) (preference for niece of decision-maker did not constitute sex or age

discrimination because nepotism is only actionable under Title VII on the bases of race or religion). Other Circuits have also cited *Thomas* with approval. *See Fernandez v. Costa Bros. Masonry, Inc.*, 199 F.3d 572 (1st Cir. Mass. 2000) (masonry contractor hired his "own men," rather than local residents, creating an adverse impact on non-Whites); *Grant v. News Group Boston*, 55 F.3d 1, 8 (1st Circ. 1995) (nepotism had an adverse impact on African-Americans for employment in a pressroom); *EEOC v. Steamship Clerks' Union*, 48 F.3d 594 (1st Cir. 1995) (nepotism had adverse impact on African-Americans and Hispanic in union job referrals); *Gains v. Boston Herald*, 998 F. Supp. 91 (D. Mass. 1998) (nepotism resulted in adverse impact against minorities); *Jensen v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993) (nepotism has an adverse impact on minorities). *Accord, Alexander v. Local 496*, 177 F.3d 394, 405-407 (6th Cir. 1999) (nepotism had an adverse impact on African-Americans for job referrals); *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 305 (1991) (word of mouth advertising had adverse impact on minorities); *Platner v. Cash and Thomas Contractors Inc.*, 908 F.2d 902, 905, n. 7 (11th Cir. 1990); *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1303 (9th Cir. 1982), *cert denied.* 1984 (policy restricting ownership of co-shares to "family members" had an adverse impact on Black and Hispanic employees); *Gibson v. Local 40*, 543 F.2d 1259, 1268 (9th Cir. 1976) (nepotism in union referrals overwhelmingly favored Whites). The Fourth Circuit's adoption of Judge Chasanow's decision implies that the Fourth Circuit has overruled its own decision in *Thomas*, causing a split in the Circuits.

A generation into the Civil Rights Act of 1964, it is no longer the norm for employers to openly make blatant racist or sexist comments with respect to hiring decisions; however, by failing to advertise positions, and by

exercising "word of mouth" hiring, whether intending or not intending to discriminate, hiring decisions may be made on golf courses and country clubs that disproportionately exclude minorities and women, thus perpetuating a disparate impact on minorities and women in the workplace. *Thomas* recognized this practice thirteen years ago and other circuits have agreed; however, Judge Chasanow's decision in *Medlock* renders *Thomas* meaningless by refusing to acknowledge or apply it. The Fourth Circuit's adoption of Judge Chasanow's decision may be interpreted as a repudiation of *Thomas*. Clarification is needed on this precedent-setting case, *Thomas*, which is included in casebooks in employment discrimination in law schools and cited, with approval, by other Circuits.

III. QUESTION # 3: Does either Title VII or the Rehabilitation Act of 1973, as amended by the Americans with Disabilities Act of 1990, protect an employee from a retaliatory performance appraisal for asserting his/her rights under Title VII?

Judge Chasanow held that a downgrade in a performance appraisal does not constitute an adverse action; however, in the context of Title VII, an adverse action is not restricted to classic adverse personnel actions such as termination, demotion or loss of a tangible job benefit. In order to establish a *prima facie* case of retaliation, Plaintiff must show that: (1) he was engaged in protected activity under Title VII; (2) he was subjected to adverse employment action; (3) and a causal connection exists between the protected activity and the adverse action. *Texas Department of Community Affairs v. Burdine*, 450 I.S. 248, 252-253 (1973); *Brown v. Brody*, 33 U.S. App. D.C. 233, 199 F.3d 446, 452 (D.C. Cir. 1999); *Stewart v. Evans*, 275 F.3d 1126, 1133, 2002 U.S. App. Lexis 418 (D.C. Cir. 2002).

In the context of Title VII, an adverse action is not restricted to classic adverse personnel actions such as termination, demotion or loss of a tangible job benefit. Retaliatory harassment may take form of interrogation, reprimands, surveillance, unwarranted or unfavorable evaluations, or deprivation of normal benefits or rights of position, such as overtime, vacations, in-house dispute resolution procedures, office privileges and client access. Lex K. Larson, *Employment Discrimination* § 34.04, at 34-57 to 34-62 (2d ed.1995) Retaliation can occur when an employer responds to protected activity in a manner that is "'more disruptive than a mere inconvenience or an alteration of job responsibilities' [or] changes in duties or working conditions that cause no materially significant disadvantage." *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997). The court in *Kim* upheld the plaintiff's claim of retaliation because his duties had been reduced, he received much lower performance evaluations than he had received before filing his employment discrimination charge and he was required to undergo special remedial training. *See also Drake v. Minnesota Mining & Manuf. Co.*, 134 F.3d 878, 886 (7th Cir.1998) ("retaliation can take the form of a hostile work environment"); *Washington v. Jenny Craig Weight Loss Ctr.*, 3 F. Supp. 2d 941, 949 (N.D. Ill. 1998) ("The very gist of a retaliatory harassment action is that the employer has 'lashed out' against an employee for filing discrimination charges); *Dortz v. City of New York*, 904 F. Supp. 127, 156 (S.D.N.Y. 1995) (employer's actions disadvantaged and interfered with employee's ability to perform her job); *Caliendo v. Bentsen*, 881 F. Supp. 44, 48 (D.D.C. 1995) (alleging personnel actions such as removal from undercover operation, failure to receive monetary award, removal as acting group supervisor, receipt of letter of reprimand, etc. constituted series of adverse employment actions in retaliation for EEOC activities).

In *Singletary v. District of Columbia*, 225 F. Supp. 43, 62 (D.C.D.C. 2000), the Court specifically recognized hostile work environment claims, based on retaliation. "Certainly, harassment in retaliation for an employee's protected activities could constitute an 'adverse employment action." *Accord Settle v. Baltimore County*, 34 F. Supp. 964, 994 (D. Md. 1999), *Cobb v. Anheuser Busch, Inc.*, 793 F. Supp. 1457, 1491 (E.D. Mo. 1990); *Gentner v. Cheyney University of Pennsylvania*, 1999 U.S. Dist. LEXIS, at 62-64, 72-73, 78-79, 83 (E.D. Pa. 1999).

Where the adverse treatment closely follows, or occurs "on the heels of" the protected activity, Plaintiff has established a *prima facie* case of retaliation. *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516 (D.C.D.C. 1999) (*prima facie* case established where non-renewal of professor's contract, less than one month after plaintiff first reported sexual harassment/stalking by a non-employee on campus and the same day as her last complaint), *citing Ramirez v. Oklahoma Dep't of Mental Health*, 41 F.3d 584, 596 (10th Cir. 1994) (adverse action a month and a half after protected activity constituted circumstantial evidence of retaliation); *Goos v. Nat'l Ass'n of Realtors*, 715 F. Supp. 2, 3-4 (D.D.C. 1989) (five weeks constituted a short enough time lapse to establish a causal connection); *Castle v. Bentsen, 867 F. Supp. 1, 3 (D.D.C. 1994)* (three to five months is a short enough time lapse between EEO activity and reprisal to establish a causal connection). *See also Brown v. Brody*, 339 U.S. App. D.C. 233, 199 F.3d 446, 452-53 (D.C. Cir. 1999); *Cones v. Shalala*, 339 U.S. App. D.C. 299, 199 F.3d 512, 520 (D.C. Cir. 2000); *Childers v. Slater*, 44 F. Supp. 2d 8, 18 (D.D.C. 1999).

Medlock informally complained of discrimination on October 12, 2000 and filed a formal complaint on October 17, 2000. On December 21, 2000, Medlock received a

performance appraisal that was lower than his previous appraisal, and, in fact, was only five points away from placing him on a "PIP," which would indicate that he was in danger of losing his job altogether.

In sharp contrast to Webster's "assessment," Medlock other supervisors and co-workers praised him as an exceptional employee. The performance appraisal given Medlock "on the heels" of his EEO complaint was intended to punish Medlock for his EEO activity and to deter him and others from making EEO complaints. This evaluation may serve as the basis for other employment and promotional opportunities, including employment outside of the government and any application that he makes to return to government. Furthermore, it is degrading and discouraging, creating emotional distress and reducing morale and motivation, for a person who has extended himself far beyond his requirements, as had Medlock. Plaintiff was entitled to proceed on this claim and summary judgment should not have been granted.

IV. QUESTION # 4: May Defendants be granted summary judgment in employment discrimination cases based upon Defendant's own conclusory affidavits, prepared by its attorneys, where no discovery has been permitted and Defendant has not even answered the Complaint?

A. The Fourth Circuit Sanctioned the District Court's Violation of this Court's Decisions regarding the Standards for Summary Judgment

1. The Material Facts are in Dispute

Pursuant to Rule 56(c), a party is only entitled to Summary Judgment where "the evidence in the record shows that there is no genuine issue as to any material

fact and the moving party is entitled to a judgment as a matter of law." Rule 56(c) requires that, for purposes of summary judgment, "the evidence of the non-movant is to be believed and all justifiable inferences drawn in his favor." *Thompson Everett, Inc. v. National Cable Advert, L.P.* 57 F.3d 1317, 1323 (4th Cir. 1995). *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 255 (1986). Summary Judgment should only be granted where "no reasonable juror" or "rational fact finder" could find in favor of the non-moving party. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000).

Judge Chasanow completely departed from the application of Rule 56(c). The material facts are very much disputed and summary judgment was improperly granted. Medlock filed a *Statement of Undisputed Material Facts* with his *Opposition to Defendant's Motion for Summary Judgment.* The Agency never filed a *Statement of Disputed Material Facts* in response or a *Statement of Material Undisputed Material Facts*; yet Judge Chasanow accepted the "boiler plate" language asserted by the Agency and held that "... it was clear from the materials accompanying the briefs of both parties that no genuine dispute as to a material aspect of any of Plaintiff's claims..." This claim is absolutely false. Many of the material facts are vehemently disputed.

Medlock is entitled to confront the decision-makers with this and other evidence, through cross-examination, to demonstrate that these purported "legitimate, non-discriminatory reasons" are pre-textual. This is particularly true where, as here, the stated "legitimate, non-discriminatory reasons" are general, conclusory and subjective. In addition, as Medlock argued in his *Opposition, Motion for Reconsideration* and *Reply*, he needs more specific information about the selectees, such as their personnel files, in order to complete the

comparisons and to demonstrate pre-text, which can only be obtained through discovery, including document requests, interrogatories and depositions.

There is evidence of disparate treatment of Medlock by his supervisor, Webster. Webster ignored the praise the Medlock received from other Human Resources employees, including his previous supervisor. Webster downgraded Medlock performance evaluation as "excellent" to "satisfactory." Medlock challenged his performance evaluation, alleging discrimination on the basis of race, sex and disability. Since Webster was on the promotion panel, he had yet another opportunity to further discriminate against Medlock on the basis of race, sex, disability and retaliation.

Medlock has alleged that Webster was motivated by race, sex and disability discrimination and retaliation when he ranked Medlock second to last of all for the candidates for promotion, and that Webster's assessment of Medlock influenced other members of the promotion Committee to rank him low as compared to other candidates. If this alleged fact is undisputed, *Medlock should be granted summary judgment*, not the Agency.

Judge Chasanow accepted, as true, all conclusory, subjective and self-serving statements made by the decision-makers in affidavits prepared by the Agency's attorneys, that they did not discriminate against Rickey Medlock. "Trial by affidavit" violates the standards set by this Court in *Anderson*, the decisions by other Circuits, and Federal Rules of Civil Procedure, as well as the interests of justice.

2. Medlock had No Opportunity for Discovery

A motion for summary judgment should only be considered where the non-moving party has had an opportunity to fully develop discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 719 (4th Cir. 1991) *cert. denied*, 502 U.S. 1095, 117 L. Ed. 2d 417, 112 S.Ct. 1172 (1992); *Nguyen v. CNA Corp*, 44 F.3d 234, 242 (4th Cir. 1995); *Iverson v. Johnson Gas*, 172 F.3d 524, 525 (8th Cir. 1999); *Aiken, v. Policy Management Systems Corporation*, 13 F.3d 138 (4th Cir. 1993); *Mann v. Princeton Community Hospital Association, Inc.*, 1992 U.S. App. LEXIS 3432 at 2 (4th Cir. 1992); *Burns v. Gadson State Community College*, 908 F.2d 1512 (11th Cir. 1990); *Snook v. Trust Co. of Georgia Bank of Savannah, N.A.* 859 F.2d 865, 870 (11th Cir. 1988); *Palmer v. Tracor Inc.*, 856 F.2d 1131 (8th Cir. 1988); *Garrett v. San Francisco Fire Department*, 818 F.2d 1515, 1518 (9th Cir. 1987); *Sperling v. Hoffman-LaRoche, Inc.* 118 F.R.D. 392, 397 (D.NJ. 1988).

Fed. R. Cv. P. 56(c) requires that summary judgment only be awarded:

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment, as a matter of law.

There were never any answers to interrogatories, admissions or depositions in this case. There are no responses to document requests. The Defendant never even answered the *Complaint*. Medlock has had no opportunity to request the documents that he deems

relevant, cross examine witnesses, or to find contradictions in the Agency's assertions or support for his position in an *Answer* to the *Complaint*, *Interrogatories* or *Admissions*.

The Agency affidavits did not even explain why the four White female selectees were purportedly more qualified than was Plaintiff for a promotion. Particularly since, under the "Pay Band" system, candidates for promotion had different jobs and worked in different locations, under different supervisors, but were competing for a limited number of promotions to the same salary range, Plaintiff was not competing for the same *job* as were the selectees, but for a completely different job, in a different department, in different NIMA offices, in a different geographic location, with different duties than any of the selectees. The Agency should be required to explain how it made such decisions.

In his *Opposition to Defendant's Motion for Summary Judgment*, Medlock submitted all relevant documentation in his possession. Medlock also specified why he needed discovery to present proof of his claims for purposes of a motion for summary judgment. Medlock is entitled to his "day in court," or at least, in discovery, to compel the Defendant Agency to explain its decision to promote only White females and bypass him, as well as all other African-American candidates for promotion under the pay band system. The trial judge deprived Plaintiff of that right and replaced it with "trial by affidavit."

Discovery is the most basic right of a litigant in collecting the information needed to properly present his/her case. Plaintiffs could be "cut off at the knees" in litigation if the Defendant could simply file a *Motion to Dismiss*, halting/preventing discovery, and simultaneously file a *Motion for Summary Judgment* which would require

the plaintiff to produce substantive evidence – not yet in plaintiff's possession – to defeat the *Motion for Summary Judgment*. Medlock asks this Court to prevent the deprivation of this basic right to discovery.

B. The Fourth Circuit Violated the Interpretation of Rule 56(f) adopted by Other Circuits and its own Previous Decisions

Judge Chasanow granted summary judgment to Defendant, relying in part on the fact that Medlock's counsel did not submit a separate affidavit with his *Opposition to Defendant's Motion for Summary Judgment*, stating the same information that was already stated in his *Opposition* – that is, absolutely no discovery had taken place and the Defendant had not even answered the complaint. Medlock's Opposition specified the need for discovery, including document production, interrogatories, requests for admissions and depositions, to prove intent, pre-text, disparate treatment and impact, and other elements of his case.

Rule 56(f) supplements Rule 56(c) by stating:

> **When affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Case law has developed, pursuant to Rule 56(f), requiring that the attorney for the party opposing summary judgment file an affidavit, along with the *Opposition*, stating the need for additional discovery in order to adequately oppose the motion for summary judgment. *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244-45 (4th Cir. 2002); however, prior to the *Medlock* decision, the Fourth Circuit held that, where the *Opposition* itself explains the need for additional discovery, it is an abuse of discretion to grant summary judgment simply because the same claims are not made in a separate attorney affidavit. *Id.* This conclusion was consistent with Supreme Court law and the law in other circuits. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 298, 88 S.Ct. 1575 (1968) (plaintiff' *Opposition* and *Statement of a Material Facts As To Which There is a Genuine Dispute*, making plain that plaintiff needed information that still remained in the defendants' hands, served as an adequate substitute for a Rule 56(f) affidavit); *Cowan v. J.C. Penney Co.*, 790 F.2d 1529, 1532 (11th Cir. 1986) (Rule 56(f) filing unnecessary where plaintiff had properly brought to court's attention that discovery was still outstanding); *Sames v. Gable*, 732 F.2d 49, 51-52 & n.3 (3d Cir. 1984) (where there were outstanding document requests, plaintiff's failure to file was "not sufficiently egregious by warrant a non-merits resolution of the case").

This approach is also supported by commentary. *See, e.g.*, Edward Brunet, *The Timing of Summary Judgment*, 198 F.R.D. 679, 689-695 (2001) (reviewing cases applying Rule 56(f) liberally and concluding that "these cases exhibit sound reasoning"); John F. Lapham, Note, *Summary Judgment Before the Completion of Discovery: A Proposed Revision of Federal Rule of Civil Procedure 56(f)*, 24 U. Mich. J.L. Ref. 253, 269 (1990) ("Courts that allow some deviation from the strict letter of rule 56(f) have the stronger argument. The intent of

the drafters to infuse the Federal Rules with a spirit of procedural liberality is evident throughout the rules themselves as well as the advisory committee's notes."); 10B Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* § 2740, at 402-406 & n.14 (3d ed. 1998).

Chernova v. Electronic Systems Services, Inc., 247 F. Supp. 2d 720, 722-723 (D. Md. 2003), a Title VII case in precisely the same procedural posture at the District Court level, held:

> Rule 56(f) requires a party that wishes to oppose a motion for summary judgment because more time is needed for discovery to file an affidavit to that effect. Fed. R. Civ. P. 56(f). The Fourth Circuit has recently held, however, that Rule 56(f) affidavits are not necessary. *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244-45 (4th Cir. 2002). If the non-moving party makes objections that satisfy the purpose of an affidavit and is not lax in pursuing discovery, he or she may not need to file a Rule 56(f) affidavit.[1] *Id.* at 245.

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[1]One leading treatise states:

The purpose of subdivision (f) is to provide an additional safeguard against an improvident or premature grant of summary judgment and the rule generally has been applied to achieve that objective. Consistent with this purpose, courts have stated that technical rulings have no place under the subdivision and that it should be applied with a spirit of liberality. Thus, in certain circumstances, courts have indicated that continuances would be proper even though Rule 56(f) had not been formally complied with when the court concluded that the party opposing summary judgment had been diligent and acted in good faith.

10B Charles Alan Wright et al., *Federal Practice and Procedure* § 2740, at 402-403 (3d ed. 1998).

"The purpose of the affidavit is to ensure that the non-moving party is invoking the protections of Rule 56(f) in good faith and to afford the trial court the showing necessary to assess the merit of a party's opposition. *Id.* at 244 (quoting *First Chicago Int'l v. United Exchange Co.*, 267 U.S. App. D.C. 836 F.2d 1375, 1380 (D.C.Cir. 1988)).

In her opposition, plaintiff states why she needs discovery and what discovery she plans to request. She contends that she needs interrogatories, depositions, and document production to prove ESS's reasons for terminating her were pretextual. (Pl.'s Opp'n at 7.) This demonstrates that plaintiff is invoking the protections of Rule 56(f) in good faith and in an attempt to allow me to assess the merits of her opposition to ESS's motion for summary judgment. Moreover, plaintiff has not been lax in discovery because she has not yet had an opportunity to conduct any discovery. (*Id.* at 6)

When the nonmoving party, through no fault of its own, has had little or no opportunity to conduct discovery, and when fact-intensive issues, such as intent, are involved, courts have not always insisted on a Rule 56(f) affidavit if the nonmoving party has adequately informed the district court that the motion is premature and that more discovery is necessary. (citations) Specifically, if the nonmoving party's objections before the district court "served

> as the functional equivalent of an affidavit" (citation), and if the nonmoving party was not lax in pursuing discovery, then we may consider whether the district court granted summary judgment prematurely, even though the non-movant did not record its concerns in the form of a Rule 56(f) affidavit.

The Fourth Circuit reaffirmed its holding in *Harrods* in *Weiters v. Roper Hospital*, 58 Fed. Appx. 40, 44, 2003 U.S. App. LEXIS 3620 at *9 (4th Cir. 2003); *Bruette v. Inman*, 2003 U.S. LEXIS App. 12754; yet, inexplicably, the same Court has prevented Medlock from conducting discovery by adopting Judge Chasanow's decision.

Rule 56(f) was intended to prevent premature summary judgment, yet, it is routinely being abused by Defendants, particularly those with huge "brief banks" of "boiler plate" motions for summary judgment. As in this case, attorneys for the United States government represent many government agencies. Their use of the little known Rule 56(f) affidavit requirement is used as a trap for plaintiffs' attorneys who have not previously encountered the Rule 56(f) pitfall. In lieu of answering the *Complaint*, addressing the merits of a case, Defendants can simply file a "*Motion to Dismiss, or, in the Alternative, for Summary Judgment*," where there has been no discovery, and *hope* that: 1) plaintiff's counsel has never previously encountered this precise issue; and 2) that the trial judge will mechanically apply the harshest ruling and clear his/her calendar of the case.

The government's routine use of the "Rule 56(f) trap" has an effect upon employees who are discriminated against in their federal employment everywhere in the country. If this Court does not grant *certiorari*, federal

employees in some jurisdictions will be permitted discovery, while others will be barred from discovery, and their day in court. The Defendant's own factual assertions – true or not, and completely unchallenged. Moreover, the rule of law is not limited to employment or the federal government as a defendant, but will be applied to all litigants for all types of claims, with inconsistent and unpredictable results.

V. QUESTION # 5: Are civil rights plaintiffs entitled to a lesser right to discovery than are parties to all other civil litigation?

In her April 4, 2002 Opinion, Judge Chasanow refused to apply the controlling law of *Harrods* to *Medlock* because *Medlock* is an employment discrimination case and *Harrods* was a trademark case. (A-31-32) There is absolutely no authority or rationale for distinguishing between a trademark case, civil rights case, or any other cause of actions in assessing the *requirements* of Rule 56(f). *Rule 56(f) is a procedural rule for all civil cases, irrespective of the causes of action.*

There can be no justification for singling out employment discrimination/civil rights plaintiffs and treating them less favorably than litigants in trademark and other civil cases. To the contrary, the right to be free from illegal discrimination has been held to be a highly regarded right and summary judgment is strongly disfavored in such cases.

Federal Courts have long disfavored summary judgment in employment discrimination cases, where motive and intent are at issue. *Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23 (1st Cir. 2001); *James v. Sheahan*, 137 F.3d 1003 (7th Cir. 1998); *Senner v. Northcentral Tech. College*, 113 F.3d 750 (7th Cir. 1997); *Wohl v. Spectrum Mfg.*, 94 F.3d 353 (7th Cir.1996), *reh, en banc,*

den. 1996 U.S. App. LEXIS 30599; *Webb v. Garelick Mfg. Co.*, 94 F.3d 484 (8th Cir. 1996); *Bohac v. West*, 85 F.3d 306 (7th Cir. 1996); *Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995); *Collier v. Budd Co.* 66 F.3d 886 (7th Cir.1995); *Perdomo v. Browner*, 67 F.3d 140 (7th Cir. 1995); *Barnhart v. Mack Trucks*, 157 FRD 427 (N.D. Ill.1994), *aff'd without op.* 52 F.3d 328 (7th Cir.1995); *Kralman v. Illinois Dep't of Veterans Affairs*, 23 F.3d 150 (7th Cir. 1994), *reh den.*, 1994 U.S. App LEXIS 13376, *cert den.*, 513 U.S. 948; *Courtney v. Biosound*, Inc. 42 F.3d 414 (7th Cir. 1994); *Batey v. Stone*, 24 F.3d 1330 (11th Cir. 1994); *Sarsha v. Sears, Roebuck & Co.* 3 F.3d 1035, *reh, en* banc, *den* (7th Cir. 1993) 1993 U.S. App. LEXIS 27267; *Piesco v. New York, Dep't of Personnel*, 933 F.2d 1149 (2nd Cir. 1991), *cert den* 502 U.S. 921 (1991); *Rosen v. Thornburgh*, 928 F.2d 528 (2nd Cir. 1991); *Thornbrough v. Columbus & G. R. Co.*, 760 F.2d 633 (5th Cir. 1985); *Jones v. Western Geophysical Co.* 669 F.2d 280 (5th Cir. 1982); *Foster v. Swift & Co.*, 615 F.2d 701 (5th Cir. 1980); *Hayden v. First Nat'l Bank*, 595 F.2d 994 (5th Cir. 1979).

Depositions, interrogatories, and document production may be necessary to determine whether a Title VII defendant's stated reason for the challenged action is pre-textual. *Chernova v. Electronic Systems Services, Inc.*, 247 F. Supp. 2d 720, 723 (D.Md. 2003). Intent and motive must be ascertained through cross-examination of the decision-makers and other witnesses regarding the Defendant's purportedly non-discriminatory reasons for the adverse action. *Id.* The demeanor and credibility of the witnesses is also relevant to determining intent and motive. Accordingly, *Chernova* specifically applied *Harrods* to a Title VII case. Although *Chernova* was decided weeks before Judge Chasanow issued her April 4, 2002 decision in *Medlock*, she never cited this controlling case.

Since *Medlock* was decided after *Chernova*, and because the Fourth Circuit affirmed *Medlock*, specifically adopting Judge Chasanow's reasoning, without analysis, *Medlock* actually overrules *Chernova*; therefore, *Judge Chasanow's conclusion that employment discrimination plaintiffs are entitled to less discovery rights, pursuant to Rule 56(f) than are trademark litigants, is the law of the Fourth Circuit.* No other circuit has ever made such a distinction. Certainly, the Fourth Circuit's decision should be brought in line with other Circuits.

CONCLUSION

Petitioner Medlock respectfully requests that this honorable Court grant *certiorari* and rule on the federal questions of civil rights, due process access to the courts involved in this case.

Respectfully submitted,

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STATUTES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides:

It shall be an unlawful employment practice for an employer...

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms and conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), provides:

It shall be an unlawful employment practice for an employer ...

> to discriminate against any of his employees or applicants for employment ...because he has opposed any practice made an unlawful employment practice by this title, or because heh as made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

The Rehabilitation Act of 1973, as amended by the Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a), *et. seq.* provides:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application

procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

RICKEY MEDLOCK, Plaintiff - Appellant, versus DONALD H. RUMSFELD, Secretary of Defense, NIMA, Defendant - Appellee.

No. 03-1699

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

86 Fed. Appx. 665; 2004 U.S. App. LEXIS 2252

December 19, 2003, Submitted
February 11, 2004, Decided

NOTICE: [**1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the District of Maryland, at Greenbelt. (CA-02-1093-DKC). Deborah K. Chasanow, District Judge.

DISPOSITION: Affirmed.

COUNSEL: Dawn V. Martin, LAW OFFICES OF DAWN V. MARTIN, Washington, D.C., for Appellant.

Thomas M. DiBiagio, United States Attorney, Kristine L. Sendek-Smith, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

JUDGES: Before LUTTIG, TRAXLER, and SHEDD, Circuit Judges.

OPINION:

[*665] PER CURIAM:

Rickey Medlock appeals from the district court's orders granting summary judgment in favor of Defendant in his employment discrimination action and denying his motion for reconsideration. On appeal, he contends that the district court erred by ruling on the motion for summary judgment prior to discovery, failing to consider his claims of disparate impact, and granting summary judgment on his retaliation claim. We have reviewed the parties' briefs, the joint appendix, and the district court's opinions and find no reversible error. Accordingly, we affirm for [**2] the reasons stated by the district court. See Medlock v. Rumsfeld, No. CA-02-1093-DKC (D. Md. Dec. 31, 2002; Apr. 4, 2003). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 27, 2004

No. 03-1699
CA-02-1093-DKC

Rickey Medlock
Plaintiff-Appellant

v.

Donald H. Rumsfeld, Secretary of Defense, NIMA
Defendant-Appellee

On Petition for Rehearing and Rehearing En Banc

The Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Luttig, Judge Traxler, and Judge Shedd.

For the Court,

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[DATE STAMP
DEC 31 2002]

RICKEY MEDLOCK

v.

Civil Action
No. DKC 2002-1093

DONALD H. RUMSFELD

MEMORANDUM OPINION

Presently pending and ready for resolution in this employment discrimination case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.* ("Title VII") and the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701-797 ("Rehabilitation Act"), is the motion to dismiss or for summary judgment of Defendant Donald Rumsfeld, Secretary of the United States Department of Defense ("DOD"). The issues have been fully briefed and no hearing is deemed necessary. Local Rule 105.6. For the reasons that follow, the court shall grant the motion.

I. Background

The following facts are uncontroverted or set forth in the light most favorable to Plaintiff. Plaintiff Rickey Medlock is an African-American male with a chronic facial pain disorder. Plaintiff is currently employed by a private contractor, Chugash Administrative Services, Inc., as an Administrative Assistant IV at the Office of Information Services of the Department of Defense, National Imaging and Mapping Agency ("NIMA"). Plaintiff was previously employed directly by NIMA from

January 23, 1997 to March 10, 2001. Plaintiff was initially employed at NIMA as a GS-6 security guard, but his facial condition and associated pain medication made his job as a security guard unworkable. In November 1998, NIMA accommodated Plaintiff pursuant to the Rehabilitation Act by transferring him to Human Resources as a Management and Program Assistant in Pay Band Level 1.[1]

On or about March 22, 1999, approximately six months after Workplace 21 took effect, Human Resources issued a vacancy announcement for two Human Resources Career Intern positions, one of which was a Band 1 position and the other a Band 2 position. Plaintiff applied and was selected for the Band 1 position effective December 5, 1999. Plaintiff alleges that the vacancy announcement for the position he accepted was phrased as a "GS" "career ladder" position as opposed to a Workforce 21 "band" position and did not indicate that promotions from the position were subject to Workforce 21. *See* Paper no. 9 at 3-4, ex. A. Plaintiff, therefore, believed he was accepting a career ladder position. On or about February 9, 2000, Plaintiff received his fiscal year 1999 performance evaluation, which covered the period from October 1, 1998 to September 30, 1999 during which Plaintiff held the position of HR Management and Program Assistant. He received an overall score of 460,

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[1]Prior to October 1, 1998, NIMA used a "career ladder" personnel system similar to the General Schedule (GS) system. Under that system, employees could be promoted through noncompetitive, career ladder promotions. On October 1, 1998, NIMA began the phased implementation of a new personnel system, Workforce 21, which essentially ended non-competitive career ladder promotions. Instead, under Workforce 21, employees can only be promoted from one "pay band" to the next through an annual competitive promotion cycle. However, employees who were on career ladders prior to October 1, 1998 were grand fathered and were thus still eligible for non-competitive, career ladder promotions.

which translated into an overall rating of "4" or "excellent."[2]

During the time Plaintiff worked as a Career Intern, he was never non-competitively promoted. He alleges that two female Career Interns without disabilities, one White and one African- American, were given non-competitive promotions during this time period. The date of hire of these female employees as Career Interns was February 1, 1998, prior to the start of Workforce 21 in October 1998. Another Career Intern, Patricia Briggs, a White female who, like Plaintiff, began after the start of Workforce 21, was not promoted under a career ladder; Plaintiff alleges, however, that she is not an appropriate comparator because she did not want to stay in the HR Department. *See id.* at 7-8.

In April of 2000, approximately four months after Plaintiff started as an HR Career Intern, HR began the annual fiscal year Workforce 21 competitive promotion process. On April 10, 2000, NIMA issued a Promotion Vacancy Announcement for Human Resources Pay Band 2. Twenty candidates, including Plaintiff, applied for this competitive position (four African-American, sixteen White; one male, nineteen female; five with disabilities, fifteen without disabilities). A promotion panel with nine members was formed to evaluate the competitiveness of the applicants for promotion, with skill narratives counting as 70 percent of the final score and performance counting as 30 percent. Plaintiff's scores ranked him last out of the twenty applicants, which was not sufficient for promotion. Instead, the panel chose the four highest-rated HR applicants for Band 2 promotion, all of whom

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[2]The rating of "4" is the second highest possible score, with "5" or "superior" as the highest possible score.

were White females.[3] The effective date on the Form SF-50 Notice of Personnel Action for the four selected applicants was August 27, 2000. Plaintiff learned of his non-selection on September 14, 2000.

Plaintiff alleges that he received the lowest score of all twenty candidates in part because his supervisor, Bobby Webster, a White male, gave him a very low rating based on discriminatory animus. Plaintiff alleges that the adverse effect of that animus was compounded because Webster sat on the promotion panel that ranked the candidates for promotion overall. Plaintiff alleges that the process used to choose candidates for promotion under Workforce 21 was arbitrary and capricious, rendering promotions subject to nepotism, discriminatory application and abuse. To support this allegation, Plaintiff refers to the fact that the overall numbers ascribed to him by the nine panel members ranged from four to twelve, out of a possible score of twenty. He argues that the wide range indicates that there could not possibly have been uniform or fair application of objective criteria. Plaintiff further alleges that the chair of the hiring panel, Judy Schiebel, a White female, assisted White female candidates in preparing their applications.

Plaintiff first contacted NIMA's EEO counselor on October 12, 2000, approximately one month after learning of his non-selection for a Band 2 position. At this meeting, Plaintiff alleged that he was discriminated against by NIMA based on race, sex, and disability because management refused to non-competitively promote him even though he was hired as a Career

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[3]Two of the four candidates selected had disabilities, including diabetes and pulmonary/respiratory disorder. Plaintiff claims, however, that these disabilities differ from Plaintiff's chronic facial pain disorder because they are not readily apparent.

Intern. It does not appear that Plaintiff raised the issue of his non-selection for the competitive promotion during this contact. After no resolution was reached at the informal stage, Plaintiff filed a formal complaint of discrimination on November 17, 2000. The EEO complaint, which was accepted for investigation, alleged that NIMA had discriminated against Plaintiff with regard to both non-competitive and competitive promotion. On December 21, 2000, Plaintiff received his performance evaluation for fiscal year 2000, which covered October 1, 1999 through September 30, 2000 and reviewed Plaintiff's performance as an HR Career Intern. Plaintiff received an overall score of 280 points, which translated into an overall rating of "3," or "successful."[4]

On or about April 12, 2001, a Report of Investigation (ROI) was sent to Plaintiff concerning his EEO complaint, recommending a finding of no discrimination. On December 26, 2001, NIMA issued a Final Agency Decision (FAD) denying all of Plaintiff's claims on the merits. Plaintiff then timely filed a complaint in this court on April 2, 2002. Plaintiff's complaint alleges that his non-selection for the competitive promotion to the Band 2 Human Resources position was due to discrimination based on race, sex, and disability. He asserts both disparate treatment and disparate impact theories for the alleged discrimination. Plaintiff's complaint also alleges that NIMA discriminated against him by denying him a non-competitive promotion during the time he served as a Career Intern. Plaintiff also alleges that NIMA

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[4]The range for an overall rating of "successful" is between 276 and 375 points. If Plaintiff had scored five points less, he would have fallen in the "marginal" overall rating category (range of 200-275 points). Plaintiff alleges that this would have made him subject to a Performance Improvement Plan, or PIP, and would have put him in danger of dismissal.

downgraded his performance rating from "excellent" to "successful" in retaliation for filing the EEO charge. Finally, Plaintiff brings a breach of contract claim against NIMA, arguing that NIMA breached its promise to him in the Vacancy Announcement for the Career Intern position to afford Plaintiff a fair opportunity to obtain promotions based on his work performance and skills. On July 1, 2002, Defendant filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) or 12(b)(6), or in the alternative for summary judgment pursuant to Fed. R. Civ. P. 56.

II. Standard of Review

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) ought not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). All that the Federal Rules of Civil Procedure require of a complaint is that it contain "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 47; *Comet Enters. Ltd. v. Air-A-Plane Corp.*, 128 F.3d 855, 860 (4th Cir. 1997). "Given the Federal Rules' simplified standard for. pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 998 (2002) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

In reviewing the complaint, the court accepts all well-pled allegations of the complaint as true and construes the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff. *Ibarra v. United States*, 120 F.3d 472, 473 (4th. Cir.

1997). The court must disregard the contrary allegations of the opposing party. *A.S. Abell Co. v. Chell*, 412 F.2d 712, 715 (4th Cir. 1969). The court need not, however, accept unsupported legal conclusions, *Revene v. Charles County Comm'rs*, 882 F.2d 870, 873 (4th Cir. 1989), legal conclusions couched as factual allegations, *Papasan v. Allain*, 478 U.S. 265, 286 (1986), or conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979).

There are two ways to present a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). A defendant may either contend (1) that the complaint fails to allege facts upon which subject matter can be based, or (2) that the jurisdictional facts alleged in the complaint are untrue. *Id.* If, as in the case now before the court, a defendant raises the first argument, then the allegations in the complaint are assumed to be true, and the court will view the motion as it would one brought under 12(b)(6). *Id.; Higgins v. United States*, 894 F.Supp. 232, 234 (M.D.N.C. 1995). However, unlike with a Rule 12(b)(6) motion, the court may consider exhibits outside the pleadings in ruling on a motion pursuant to Rule 12(b)(1) without converting the motion to one for summary judgment. *See Williams v. U.S.*, 50 F.3d 299, 304 (4th Cir. 1995) (citing *Mortensen v. First Federal Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)).

It is well established that a motion for summary judgment will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In other words, if there clearly exist factual issues "that

properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," then summary judgment is inappropriate. *Anderson*, 477 U.S. at 250; *see also Pulliam Inv. Co. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987); *Morrison v. Nissan Motor Co.*, 601 F.2d 139, 141 (4th Cir. 1979); *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950). The moving party bears the burden of showing that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c); *Pulliam Inv. Co.*, 810 F.2d at 128 (citing *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979)).

When ruling on a motion for summary judgment, the court must construe the facts alleged in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592, 595 (4th Cir. 1985). A party who bears the burden of proof on a particular claim must factually support each element of his or her claim. "[A] complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 323. Thus, on those issues on which the nonmoving party will have the burden of proof, it is his or her responsibility to confront the motion for summary judgment with an affidavit or other similar evidence. *Anderson*, 477 U.S. at 256.

In *Celotex Corp.*, the Supreme Court stated:

> In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file."

> Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Celotex Corp., 477 U.S. at 324. However, "'a mere scintilla of evidence is not enough to create a fact issue.'" *Barwick v. Celotex Corp.*, 736 F.2d 946, 958-59 (4th Cir. 1984) (quoting *Seago v. North Carolina Theaters, Inc.*, 42 F.R.D. 627, 632 (E.D.N.C. 1966), *afffd*, 388 F.2d 987 (4th Cir. 1967)). There must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

III. Analysis

A. Promotion (Non-Competitive and Competitive)

1. Motion to Dismiss

Before filing a civil action in federal court under Title VII or the Rehabilitation Act, a federal employee is required to exhaust all available administrative remedies. See 42 U.S.C. § 2000e-16(c); *Brown v. General Serv. Admin.*, 425 U.S. 820, 832 (1976); *Zografov v. V.A. Medical Center*, 779 F.2d 967, 968-69 (4th Cir. 1985). Defendant argues that Plaintiff's claim that Defendant discriminated against him by not non-competitively

promoting him should be dismissed because Plaintiff did not timely raise this claim with an EEO counselor at the agency level and, thus, has not exhausted his administrative remedies with respect to this claim.[5] Defendant cites to a regulation governing employment discrimination claims brought by federal employees which provides that: "an aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105 (a)(1). The Fourth Circuit has held that a federal employee's failure to consult with an EEO counselor within the required time period constitutes grounds for dismissing the employee's civil action for failure to exhaust administrative remedies. *See Zografov*, 779 F.2d at 970; *Blount v. Shalala*, 32 F.Supp.2d 339, 341 (D.Md. 1999).

In the instant case, it is undisputed that Plaintiff first contacted an EEO counselor regarding not receiving a noncompetitive promotion on October 12, 2000. Therefore, the court can only address issues that relate to events alleged to have occurred up to 45 days prior, which is August 28, 2000. Defendant argues that no

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[5]Defendant has filed the motion to dismiss under both 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim. The Fourth Circuit held in *Zografov* that the plaintiff's failure to consult an EEO counselor should be treated as a simple failure to exhaust administrative remedies, rather than as a lack of subject matter jurisdiction. 779 F. 2d at 969, 970. Therefore, the court will likewise treat Defendant's motion as a 12 (b)(6) motion for failure to state a claim.

Additionally, the court rejects Plaintiff's argument that Defendant may not raise timeliness arguments at this stage. When a federal employee seeks *de novo* review of his discrimination claims in court, the entire case, including procedural matters, are addressed anew. *See Chandler v. Roudebush*, 425 U.S. 840, 848 (1976) . Therefore, the court may analyze *de novo* whether Plaintiff exhausted his administrative remedies.

discriminatory act occurred and no discriminatory personnel action became effective during that time period pertaining to Plaintiff's non-selection for a non-competitive promotion. The effective date of Plaintiff' selection as a Career Intern was December 5, 1999, and Defendant became aware at the latest in March or April of 2000 that he would not be receiving a non-competitive promotion. Plaintiff argues, however, that there was no definitive determination regarding this matter in March or April of 2000 and that there was no adverse action until Plaintiff was actually denied a promotion on September 14, 2000. Plaintiff argues that by initiating contact with an EEO counselor on October 12, 2000, he was, therefore, well within the 45 day period. Defendant argues that the September 14, 2000 notice of non-selection for promotion pertained only to the *competitive* promotion, not the non-competitive promotion, and that the 45 day requirement was therefore not met.

The court disagrees with Defendant's reasoning that the September 14, 2000 notice of non-selection does not correlate wlth the non-competitive promotion. What mattered to Plaintiff was that he did not receive a promotion, whether non-competitive or competitive. Even if Plaintiff had learned earlier that he would not be receiving a non-competitive promotion, he did not suffer a tangible, adverse action until he was denied the competitive non-promotion on September 14, 2000 and, therefore, could not have filed a discrimination complaint until then. Once there was a tangible action about which to complain, he timely initiated contact with an EEO counselor on October 12, 2000 regarding the allegedly discriminatory non-selection.

Defendant further argues that Plaintiff's non-promotion claim should be dismissed because more than 45 days lapsed between Plaintiff's non-selection for the

competitive promotion and the date Plaintiff's formal EEO complaint was filed, November 17, 2000. Defendant asserts that the date of Plaintiff's non-selection was August 27, 2000, which was the effective date on the SF-50 Notice of Personnel Action forms of the successful applicants for the promotion, despite the fact that Plaintiff did not learn of his non-selection until September 14, 2000. The Fourth Circuit has held that for the purposes of starting the 45-day time period, the effective date of a non-selection for a position is the effective date on the SF-50 of the person selected for the position. *See Jakubiak v. Perry*, 101 F.3d 23, 27 (4th Cir. 1996). However, the court has also noted that federal regulations provide for a waiver of the 45 day limit when a plaintiff shows that he "did not know and reasonably should not have known that the discriminatory matter or personnel action occurred." 29 C.F.R. § 1614.105(2); *id.* Plaintiff in the instant case did not have access to the SF-50s of the selectees and could not possibly have known that he had not been selected until he received notice of his non-selection on September 14. Thus, the relevant starting date of the 45 day limit is September 14, not August 27.

Defendant asserts that even if September 14, 2000 is the appropriate start date of the 45 day period, Plaintiff still did not timely consult an EEO counselor because he did not raise the issue of the competitive promotion (as opposed to the non-competitive promotion which was raised in the initial September 14 contact) until he filed the formal complaint on November 17, 2000. The court cannot agree. When Plaintiff met with the EEO counselor on October 12, 2000 to discuss what he believed to be discriminatory denial of a promotion, he was not required to specify the type of non-promotion, but merely to allege discrimination with respect to promotion. His discussion with the EEO counselor on October 12,

therefore, was sufficient to cover both competitive and non-competitive non-promotion. Plaintiff was therefore well within the 45 day limit when he met with the EEO counselor on October 12, 2000 after having received notice of his non-selection on September 14, 2000. Accordingly, Defendant's motion to dismiss pursuant to Rule 12(b)(6) for failure to exhaust administrative remedies will be denied.

2. Motion for Summary Judgment

Defendant has argued in the alternative for summary judgment on Plaintiff's non-promotion claim. Plaintiff asserts that summary judgment is inappropriate at this stage because discovery must be permitted in order to obtain the proof necessary to establish pretext. However, a party opposing summary judgment may not merely assert in his opposition that discovery is necessary. Rather, the party must file an affidavit that "particularly specifies legitimate needs." *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995). Plaintiff has provided no such affidavit specifically identifying the areas which require discovery. Thus, it is appropriate to consider Defendant's motion for summary judgment at this time.

Plaintiff has alleged that Defendant discriminated against him in the form of disparate treatment by not promoting him on either a competitive or a non-competitive basis because of his race, sex, and disability.[6]

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[6]Plaintiff also alleges that the competitive Workforce 21 promotion process had a disparate impact on him. Disparate impact claims arise "'where facially neutral rules or policies are applied, in a way that affects the protected class differently from other groups.'" *Pathways Psychosocial v. Town of Leonardtown, MD*, 133 F.Supp.2d 772, 788 (D.Md. 2001) (citations omitted). Plaintiff purports to attack the subjective decision making in the promotion process of Workforce 21 as

To prove disparate treatment under Title VII and the Rehabilitation Act, Plaintiff must prove discriminatory intent either through direct evidence of discriminatory animus or through indirect evidence. Plaintiff has offered no direct evidence of discriminatory animus, thus this case is properly analyzed under the indirect, burden-shifting framework first set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Under the *McDonnell Douglas* framework, the plaintiff must first establish a *prima facie* case of discrimination. *See McDonnell Douglas Corp.*, 411 U.S. at 802. In order to make a *prima facie* case of discrimination in the denial of a promotion, a plaintiff must show that: (1) he is a member of a protected group; (2) he applied for the position in question; (3) he was qualified for the position; and (4) he was rejected under circumstances giving rise to an inference of discrimination. *See Evans v. Technologies Applications and Serv., Co.*, 80 F.3d 954, 959-60 (4th Cir. 1996); *Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994). Once a plaintiff establishes a *prima facie* case of discrimination, the burden of production shifts to the defendant to present a legitimate, non-discriminatory reason for the adverse employment action alleged. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000) (citing *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). The plaintiff must then "'prove by a preponderance of the evidence that the

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having a disparate impact. However, Plaintiff does not and cannot allege that subjective decision making itself is a practice that discriminates. *See Brooks v. Circuit City Stores, Inc.*, 1996 WL 406684, *4 (D.Md. 1996). Rather, Plaintiff can only allege that it allows a situation to exist in which the individual members of the promotion panel are able to discriminate intentionally. *Id.* The gravamen of the claim remains individual employment decisions; therefore, analysis of the non-promotion claim is appropriate under a disparate treatment theory only, not disparate impact.

legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" *Id.*

In the instant case, it is undisputed that Plaintiff is an African-American male, although Defendant disputes that Plaintiff has a disability covered by the Rehabilitation Act.[7] With regard to the non-competitive career ladder promotion, the parties disagree about whether Plaintiff actually applied for and was qualified for the promotion. Plaintiff argues that the Career Intern position he held was a career ladder position which entitled him to a non-competitive promotion. However, even if Plaintiff could show that he held a career ladder position, Defendant has produced a legitimate, non-discriminatory reason why Plaintiff was not given a non-competitive promotion. Specifically, Defendant has stated that the Workforce 21 system effective as of October 1, 1998 phased out non-competitive promotions under the career ladder scheme. In order to be grandfathered under the old system, an employee must have been on a career ladder prior to that date. Plaintiff did not become a Career Intern until December 5, 1999. Accordingly, he was ineligible for a non-competitive promotion. Plaintiff has not shown that the legitimate, non-discriminatory reason offered by Defendant is pretextual. Although Plaintiff states that two female Career Interns were granted non-competitive promotions after the implementation of Workforce 21, Defendant has proffered evidence that the effective date of their selection as Career Interns was February 1, 1998, *before* the implementation of Workforce 21. *See* Paper no. 6, ex. 26. Thus, they were properly grandfathered into the career

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[7]Defendant does not challenge Plaintiff's claim that he has a chronic facial pain condition, but rather argues that the condition does not substantially impact one of Plaintiff's "major life activities." 29 C.F.R. § 1614.203 (a)(1).

ladder scheme, unlike Plaintiff. Defendant also notes that a White female Career Intern with no disability who was appointed as a Career Intern on November 7, 1999 was, like Plaintiff, not given a non-competitive promotion because she started after the implementation of Workforce 21 had begun. Plaintiff alleges that exceptions for non-competitive promotions were made after the implementation of Workforce 21, but has failed. to provide any evidence to substantiate this allegation. Thus, Plaintiff has not and cannot overcome Defendant's legitimate, non-discriminatory reason with respect to a non-competitive promotion.

Plaintiff similarly cannot prove pretext with respect to Defendant not selecting him for a competitive promotion to Band 2. Even if Plaintiff could establish a *prima facie* case of discrimination regarding the competitive promotion, an issue the court need not conclusively decide here, Defendant has produced legitimate, non-discriminatory reasons for Plaintiff's non-selection. In particular, Defendant has shown that Plaintiff was not selected for the Band 2 promotion because the promotion panel determined that he lacked breadth of assignments and experience, his skills narrative did not support the required level of skill proficiency, and he lacked significant experience and/or skills. *See* Paper no. 6, ex. 29. Defendant ranked last of all the candidates in the promotion process. In order to overcome the legitimate, non-discriminatory reasons for his non-selection, Plaintiff "must establish that [he] was the better qualified candidate for the position sought." *Evans*, 80 F.3d at 960 (citing *Gairola v. Virginia Dep't of Gen. Servs.*, 753 F.2d 1281, 1287 (4th Cir. 1985)). Plaintiff has failed to offer any evidence to do so. Although Plaintiff has submitted positive evaluations of his work performance from other supervisors of co-workers, *see* Paper no. 1, ex. C, D, they do not begin to establish that

Plaintiff was more qualified for the Band 2 promotion than the four candidates who were selected. Because Plaintiff has not proven that Defendant's legitimate, non-discriminatory reasons for his non-selection are pretextual, Defendant is entitled to summary judgment on the non-promotion claim.

B. Retaliation

Plaintiff alleges that NIMA management retaliated against him for participating in protected EEO activity by downgrading his performance rating from "excellent" in FY 1999 to "successful" in FY 2000. Title VII "prohibits an employer from discriminating against an employee in retaliation for that employee's opposition to, or complaint about, an unlawful employment practice." 42 U.S.C. § 2000e-3(a). Where, as here, Plaintiff sets forth no direct evidence of retaliation, Plaintiff may satisfy the burden of proof through the indirect, burden-shifting method of proof set forth in *McDonnell Douglas, Burdine*, and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-08 (1993); *see also Fitch v. Solipsys Corp.*, 94 F.Supp.2d 670 (D.Md. 2000) ("The *McDonnell Douglas* burden-shifting scheme applies in analyzing retaliation claims under Title VII") (citing *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 248 (4th Cir. 2000)).

In order to establish a *prima facie* case of retaliation, a. plaintiff must show (1) that the employee engaged in protected activity; (2) that the employer took an adverse employment action against the employee; and (3) that a causal connection existed between the protected activity and the adverse action. *See Von Gunten v. Maryland*, 243 F.3d 858, 863 (4th Cir. 2001); *Munday v. Waste Management of North Am., Inc.*, 126 F.3d 239, 242 (4th Cir. 1997). In the case at bar, it is undisputed that Plaintiff engaged in protected EEO activity when he filed

his internal discrimination complaint. With respect to the second element, the Fourth Circuit Court of Appeals has held that an adverse employment action includes any retaliatory act "if, but only if, that act . . . results in an adverse effect on the 'terms, conditions, or benefits'" of employment. *Von Gunten*, 243 F.3d at 866 (quoting Munday, 126 F.3d at 243). Here, the alleged adverse employment action was the downgrade of Plaintiff's performance rating from "excellent" to "successful." A retaliatory downgrade of performance evaluation could constitute an adverse employment action, but only if it negatively impacts a term, condition, or benefit of employment. *See id.* at 867; *Thompson v. Potomac Electric Power Company*, __ F.3d __ (4th Cir. 2002); *see also Spears v. Missouri Dept. of Cor. & Human Res.*, 210 F.3d 850, 854 (8th Cir. 2000) ("A poor performance rating does not in itself constitute an adverse employment action because it has no tangible effect upon the recipient's employment . . . [and] is actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment."). Here, Plaintiff has offered no evidence that his performance rating of "successful" negatively impacted his pay, hours, responsibilities, benefits, or job security in any way. Plaintiff merely asserts that if Plaintiff had received five fewer points, he would have been placed on a "PIP" and would be in danger of losing his job. This hypothetical assertion is insufficient to satisfy the requirement that Plaintiff actually suffered an adverse impact on the terms, conditions, or benefits of his employment. Accordingly, Defendant is entitled to summary judgment on the retaliation claim.[8]

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[8]Because Plaintiff has failed to allege or provide evidence of an adverse employment action, the court need not (and cannot) address the third prong of the retaliation *prima facie* case.

C. Breach of Contract

Plaintiff alleges that NIMA breached the promise it made to him in the Vacancy Announcement for the Career Intern position that he would be mentored, trained, prepared for promotions and afforded a fair opportunity to obtain those promotions. Plaintiff claims that had those representations not been made to him, he would have accepted another offer from the Department of Defense for a career ladder position with promotion potential to GS-8. This breach of contract claim must fail. The federal employment relationship is not governed by the law of contracts, but rather by statute. *See, e.g., Urbina v. United States*, 192 Ct.Cl. 875, 881, 428 F.2d 1280, 1284 (1970) ("public employment does not . . . give rise to a contractual relationship in the conventional sense.") Thus, the Vacancy Announcement for the Career Intern position does not. constitute an employment contract between Plaintiff and Defendant. Further, the Supreme Court has foreclosed arguments of equitable estoppel against the federal government where, as here, public monies are at stake. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 426 (1990). Accordingly, the motion for summary judgment with respect to this claim will be granted.

IV. Conclusion

For the foregoing reasons, Defendant's motion to dismiss or, in the alternative, for summary judgment will be granted with respect to all claims. A separate Order will be entered.

/s/
DEBORAH K. CHASANOW
United States District Judge
December 31, 2002.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RICKEY MEDLOCK

v. Civil Action
No. DKC 2002-1093

DONALD H. RUMSFELD

MEMORANDUM OPINION

Presently pending and ready for resolution is Plaintiff Rickey Medlock's motion for reconsideration, pursuant to FED. R. CIV. P. 59 and 60, of the court's December 31, 2002 order granting Defendant's motion for summary judgment. The issues have been fully briefed and no hearing is deemed necessary. Local Rule 105.6. For reasons that follow, the court shall deny the motion.

I. Standard of Review

A. Rule 59

"A motion for reconsideration [pursuant to FED. R. CIV. P. 59(e)] is granted only in limited circumstances." *Microbix Biosystems, Inc. v. Biowhittaker, Inc.*, 184 F.Supp.2d 434, 436 (D.Md. 2000). "[T]he federal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits." *White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445, 451 (1982). It may be made for one of three reasons:

> (1) to accommodate an intervening change in controlling law; (2) to account for new

> evidence not [previously] available . . .; or (3) to correct a clear error of law or prevent manifest injustice.

Hill v. Braxton, 277 F.3d 701, 708 (4th Cir. 2002). "[A] motion to reconsider is not a license to reargue the merits or present new evidence." *Royal Insurance Co. of America v. Miles & Stockbridge, P.C.*, 142 F.Supp.2d 676, 677 n. 1 (D.Md. 2001), *citing RGI, Inc. v. Unified Indus., Inc.* 963 F.2d 658 (4th Cir. 1992).

B. Rule 60

Fed. R. Civ. P. 60(b) provides that:

> the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Rule 60(b) is reserved for special limited circumstances where equity requires reconsideration. *See generally*

Wright & Miller, 11 Federal Practice and Procedure § 2857. A party moving for reconsideration of a summary judgment order "faces a substantial burden." *FDIC v. Heidrick*, 812 F.Supp. 586, 588 (D.Md. 1988), *aff'd sub nom. FDIC v. American Cas. Co. of Reading, Pa., Inc.*, 995 F.2d 471 (4th Cir. 1993). As stated by the Fourth Circuit:

> To bring himself within Rule 60(b), the movant must make a showing of timeliness, a meritorious defense, a lack of unfair prejudice to the opposing party, and exceptional circumstances. *Compton v. Alton Steamship Co.*, 608 F.2d 96, 102 (4th Cir. 1979). Once the movant has made such a showing, he must proceed to satisfy one or more of the rule's six grounds for relief from judgment, which include "mistake, inadvertence, surprise, or excusable neglect" under subsection (1), "a prior judgment upon which [the judgment] is based has been reversed or otherwise vacated" under subsection (5), and "any other reason justifying relief from the operation of the judgment" under subsection (6). We have explained, however, that these grounds for relief often overlap, and it is difficult if not inappropriate in many cases to specify or restrict the claim for relief to a particular itemized ground. *Compton v. Alton Steamship Co.*, 608 F.2d at 102. This overlapping and the broad phrasing of the rule free courts to do justice in cases in which the circumstances generally measure up to one or more itemized grounds.

Werner v. Carbo, 731 F.2d 204, 206-07 (4th Cir. 1984).

II. Analysis

Plaintiff bases his motion for reconsideration primarily on two arguments, one procedural and one substantive: (1) the court made a clear error of law in granting summary judgment before discovery had taken place, and (2) the court made a clear error of law with respect to Plaintiff's disparate impact claim.

A. Summary Judgment Before Discovery

Plaintiff argues in his reply to Defendant's opposition to his motion for reconsideration that the granting of summary judgment prior to discovery was a "clear error of law" and, therefore, falls within one of Rule 59(e)'s three grounds for reconsideration.[1] Generally speaking, "summary judgment [must] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986). However, as the court noted in its December 31, 2002 opinion, a party opposing summary judgment may not merely assert in his opposition that discovery is necessary. Rather, if a party believes that discovery is necessary for it to demonstrate a genuine issue of material fact, the party must file a Rule 56(f) affidavit that states that it "could not properly oppose a 5 motion for summary judgment without a chance to conduct discovery," *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 961 (4th Cir. 1996), and that "particularly specifies legitimate needs." *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995). The *Evans* court

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[1]Plaintiff claims that, for the same reasons discussed with respect to Rule 59(e), his arguments also fall within Rule 60(b)(6) which allows the court to amend its decision for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6).

warned litigants that it places "great weight on the Rule 56(f) affidavit" and that "'[a] reference to Rule 56(f) and the need for additional discovery in a memorandum of law in opposition to a motion for summary judgment is not an adequate substitute for a Rule 56(f) affidavit.'" *Evans*, 80 F.3d at 961 (citation omitted). The court warned that failure to file an affidavit under Rule 56(f) is "itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate." *Id.*, *citing Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994).

Plaintiff concedes that he did not file the affidavit required by Rule 56(f) setting forth the reasons why he could not "present by affidavit facts essential to justify [his] opposition . . . ." Fed. R. Civ. P. 56(f). He argues, however, that he met the substantive requirements of Rule 56(f), though not in affidavit form, in his opposition to Defendant's motion for summary judgment.[2] For support of this argument, Plaintiff cites to *Harrods Ltd. v. Sixty Internet Domain Names, et al.*, 302 F.3d 214 (4th Cir. 2002), where the Fourth Circuit weighed the "general rule [that] summary judgment is appropriate only after 'adequate time for discovery,'" against the affidavit requirement of Rule 56(f). *Id.* at 244 (internal citations omitted). In *Harrods*, the district court had granted summary judgment as to six Argentinian domain names

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[2]Additionally, Plaintiff's counsel now submits an affidavit in order to comply with "the letter, as well as the spirit of Rule 56(f))." Paper no. 15, at 2. This affidavit is clearly overdue. In the affidavit, Plaintiff's counsel tries to explain that she did not file a Rule 56(f) affidavit earlier because she did not believe that Plaintiff's case was "even in the category of cases" requiring the non-moving party to explain why discovery was needed. *Id.*, Ex. A, ¶4. However, to the extent that Rule 60(b) applies here, it does not protect Plaintiff from his lawyer's miscalculations. *See, e.g., Evans v. United Life & Accident Ins. Co.*, 871 F.2d 466, 472 (4th Cir. 1989) ("a lawyer's ignorance or carelessness do [sic] not present cognizable grounds for relief under [Rule] 60(b)").

at the beginning of discovery in an *in rem* trademark suit brought by Harrods UK under the Anticybersquatting Consumer Protection Act. *Id.* at 242. In its opposition to the motion for summary judgment, as well as during a hearing, Harrods UK repeatedly stated that it needed discovery to obtain evidence that the defendants acted in bad faith, but it never filed a Rule 56(f) affidavit. *Id.* at 245-46. In granting early summary judgment, the district court did not base its decision on Harrod UK's failure to submit a Rule 56(f) affidavit, but rather on its conclusion that discovery was not needed to resolve the case as to those six domain names. *Id.* at 246.

In considering whether the district court had prematurely cut off discovery, the Fourth Circuit noted that

> Harrods UK made it clear to the district court in the summary judgment proceedings that its case hinged on its ability to establish Harrods BA's bad faith, which is a fact-specific issue. Harrods UK repeatedly explained to the district court both in writing and orally that more discovery was needed and that it was too early to decide the motion for summary judgment. The district court was thus fully informed about why Harrods UK was requesting the normal time to conduct discovery, and the absence of a Rule 56(f) affidavit did not figure in the court's decision to grant early summary judgment to the six Argentina Names. In these circumstances, the purposes of Rule 56(f) were served. As a result, it would be unfair to penalize Harrods UK for failing to file the formal affidavit called for by the rule.

Id. at 246. However, the court also stated that

> [a]lthough the particular circumstances of this case mean that Harrods UK will not be penalized for failing to state its case for more discovery in an affidavit, we hasten to add that parties who ignore Rule 56(f)'s affidavit requirement do so at their own peril. We reiterate that our court expects full compliance with Rule 56(f) and that the "failure to file an affidavit under Rule 56(f) is itself sufficient grounds to reject a claim that the opportunity for discovery 8 was inadequate." *Evans*, 80 F.3d at 961 (quotations omitted).

Id., n. 19.

In *Evans*, an employment discrimination case more factually similar to the one at hand, the court held that summary judgment was properly granted without discovery because even though the plaintiff's opposition memorandum referred to lack of opportunity for discovery, the plaintiff had not filed a Rule 56(f) affidavit, nor had she filed any discovery requests or moved for a continuance. *See Evans*, 80 F.3d at 961. The court ruled that the plaintiff's mention of discovery concerns twice in her opposition memorandum was insufficient to compel denial of the defendant's summary judgment motion. *Id.* Similarly, in the instant case, Plaintiff generally raised discovery concerns twice, without clearly informing the court what discovery he believed was needed. *See* Paper no. 9, at 2, 11.

While the specific facts in *Harrods* led the court to conclude that the plaintiff's efforts had served the purpose of the Rule 56(f) affidavit, as noted earlier, it

clearly did not eliminate the Rule 56(f) affidavit requirement discussed in *Evans* and *Nguyen*. The *Harrods* court specifically preserved the principle that "failure to file an affidavit under Rule 56(f) is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate." *Harrods*, 302 F.3d at 246, n. 19 (internal citation omitted). For the above reasons, the court does not agree that it was a clear error of law to grant summary judgment without discovery in the current case in the absence of a Rule 56(f) affidavit.

Plaintiff further argues that even if the court's strict adherence to the Rule 56(f) affidavit requirement is not a clear error of law, it would still result in "manifest injustice." The court cannot agree. The gravamen of Plaintiff's argument is that the court's application of a procedural rule to Plaintiff's case deprives him of the right to be protected from illegal discrimination. There is no support in the law for this proposition; indeed, this argument flies in the face of precedent from this circuit and others applying Rule 56(f). *See, e.g., Evans*, 80 F.3d at 961-62; *Nguyen*, 44 F.3d at 242.

B. Disparate Impact Claims

Plaintiff re-asserts his claims that the Workforce 21 promotion policy and nepotism in its application purportedly had a disparate impact on African-Americans. To the extent that Plaintiff is simply trying to reargue the case, he is not permitted to do so. Where a motion does not raise new arguments, but merely urges the court to "change its mind," relief is not authorized. *United States v. Williams*, 674 F.2d 10 310, 312 (4th Cir. 1982). To the extent Plaintiff is arguing, as he states for the first time in his reply to Defendant's opposition, that the court made an error of law with regard to this claim, the court does not agree. In the December 31, 2002

memorandum opinion, the court noted that what Plaintiff purported to be a disparate impact claim really fell within the category of a disparate treatment claim:

> Disparate impact claims arise "'where facially neutral rules or policies are applied in a way that affects the protected class differently from other groups.'" *Pathways Psychosocial v. Town of Leonardtown, MD*, 133 F.Supp.2d 772, 788 (D.Md. 2001) (citations omitted). Plaintiff purports to attack the subjective decision making in the promotion process of Workforce 21 as having a disparate impact. However, Plaintiff does not and cannot allege that subjective decision making itself is a practice that discriminates. *See Brooks v. Circuit City Stores, Inc.*, 1996 WL 406684, *4 (D.Md. 1996). Rather, Plaintiff can only allege that it allows a situation to exist in which the individual members of the promotion panel are able to discriminate intentionally. *Id.* The gravamen of the claim remains individual employment decisions; therefore, analysis of the nonpromotion claim is appropriate under a disparate treatment theory only, not disparate impact.

Plaintiff has offered no reason to conclude that the court's analysis was a clear error of law.[3] With regard to the

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[3] In any event, as Defendant noted in its reply to Plaintiff's opposition to its motion to dismiss or for summary judgment, an attempt by Plaintiff to bring an actual disparate impact claim would likely have been subject to dismissal for failure to exhaust administrative remedies because he did not raise this issue with an EEO counselor or in his EEO complaint. *See* 42 U.S.C. § 2000e-16(c); *Brown v. General Serv. Admin.*,

competitive promotion system of Workforce 21 in general, and the alleged nepotism of Judy Schiebel, the white, female head of the promotion panel, in particular, the basic issue is individual treatment of Plaintiff, not a facially neutral test or policy that disparately impacts blacks in general. Therefore, the court declines to grant Plaintiff's motion for reconsideration of this claim.

III. Conclusion

For the foregoing reasons, the court will deny Plaintiff Rickey Medlock's motion for reconsideration. A separate Order will be entered.

/s/
DEBORAH K. CHASANOW
United States District Judge
April 4, 2003

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425 U.S. 820, 832 (1976); *Zografov v. V.A. Medical Center*, 779 F.2d 967, 968-69 (4th Cir. 1985).